Municipal Unemployment Insurance (UI) Task Force Report

November 15, 2012

Task Force Members

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EXECUTIVE SUMMARY

The Municipal Unemployment Insurance (UI) Task Force was convened by Governor Deval Patrick in March 2012 to review UI issues raised by municipalities, determine which issues were systemic and broad-based, and reach conclusions and legislative, administrative, and procedural recommendations to address these issues. The Task Force members are: Secretary Joanne F. Goldstein (EOLWD) (Chair); Mayor Kim Driscoll (Salem) (President, MA Mayors' Association); Mayor Setti Warren (Newton); Senator Dan Wolf; Representative David Torrisi; Michael Widmer (MA Taxpayers Association); Hon. Raya Dreben, Associate Justice of the Appeals Court (Ret.); Paul Toner (MA Teachers Association), and Jenn Springer (MA AFL-CIO).

The Task Force met 5 times, during which it reviewed the issues presented by municipalities, materials provided by the Department of Unemployment Assistance (DUA), comments by municipalities and their associations, such as the Massachusetts Municipal Association (MMA), and additional data that it requested of DUA.

The issues clustered around several categories of public employees, which represent only .5% of all UI claims in the Commonwealth. The Task Force focused on those that had widespread applicability among municipalities and were frequently raised as challenges that affected the largest number of cities and towns.

After careful consideration of each of these categories, which included a review of current state and federal law, U.S. Department of Labor mandates, municipal-specific issues, DUA practice and policy, practices and perceptions of municipalities, and impact on both public and private employers and employees, the Task Force reached the following conclusions and recommendations.

RETIREES:

- Issue: payment of UI benefits to public sector retirees who return to work for their previous employer, from whom they receive a defined benefit pension, and then stop working when they reach a statutory cap based on either hours or wages (referred to as 960-hour employees) or to "critical needs" educators, who have no cap, when their positions end. The other issue involves public employees who apply for and receive UI benefits on being mandatorily retired at age 65.
- Recommended Solution: a statutory change that would reduce the UI benefits of all retirees, public and private, who receive a defined benefit pension, when their post-retirement wages are paid by an employer for whom they worked at least 75% of the time period covered by the defined benefit pension. The proposed legislation would reduce the retiree's weekly UI benefits by 65% of the retiree's weekly pension payment. This 65% deduction recognizes that the

employee has also substantially contributed his/her own earnings to the pension plan in the offset as well as the economic concerns regarding retirees with minimal pensions.

- Key Outcome: Covered individuals whose annual pension is $53,920 or higher would not receive any UI benefits, even though technically eligible, because their pension offset would be the same or greater than their UI benefit amount. Even below that threshold amount, most retirees would receive zero or minimal UI benefits, based on the factors that go into the calculation of the offset.

SCHOOL BASED EMPLOYEES:

- Issue: payment of UI benefits to three categories of school-associated employees: (1) non-tenured educators who do not receive a reasonable assurance of a contract renewal for the subsequent school year; (2) school-based employees who are paid by the municipality directly and not by the school department (such as crossing guards or school bus drivers), and (3) substitute teachers.
- Recommended Solution:
    - For school-based employees who are not paid directly by the school department, a statutory change is recommended to make them ineligible for UI even if there is no work available (i.e., summer or other school vacation) by including them in existing "reasonable assurance" exceptions, the same as school-associated employees who are paid directly by the school department.
    - No state statutory changes are available under federal law to alter "reasonable assurance" for the summer break. But the Task Force recommends two policy/administrative changes for DUA and better management of reasonable assurance policy and practice by municipalities that will reduce UI benefit payments to educators and school-associated staff over the summer months and during school year vacation breaks, thereby assisting cities and towns with managing their UI costs.
    - Substitute teachers will be included in the reasonable assurance policy changes noted above and will also be subject to additional limitations on UI benefits as on call employees, noted below.
- Key Outcome: all public employees providing services to a public school who have a reasonable assurance of continued employment would be ineligible for UI benefits when there is no work available because school is not in session, whether over the summer or during breaks throughout the school year. Further, those employees who, having been initially laid off, later receive reasonable assurance of re-employment, will thereafter no longer be eligible for UI benefits. UI eligibility for substitute teachers is significantly restricted.

SEASONAL EMPLOYEES:

- Issue: How to ensure that the seasonal certification exemption from UI is properly managed and how to revise seasonal certification regulations so that municipalities and other employers can transfer seasonally-certified employees to other positions without transferring seasonal wages towards UI eligibility.
- Recommended Solution: It is recommended that DUA clarify its rules and procedures for certification of seasonal employment, especially as it relates to a certified seasonal employee transfer to non-seasonal employment. It is also recommended that DUA allow a municipality to amend its seasonal certification mid-season to request up to the maximum 16 weeks.
- Key Outcome: Will allow municipalities to better manage their seasonal needs, ensure that defined seasonal employees are not UI eligible at the end of the season, that individuals fulfill all statutory requirements if receiving UI benefits, and that municipalities, and other employers, will be able to transfer certified seasonal employees to non-seasonal positions without UI implications.

ELECTION DAY WORKERS:

- Issue: Individuals who work intermittently only on election days and are currently eligible for UI benefits.
- Recommended Solution: Statutory change to exempt the service performed as an election official or election worker, if the wages received by the individual during the calendar year serving in this capacity are less than $1,000.
- Key Outcome: Municipalities would no longer be charged for UI benefits to election workers who earn less than $1,000 per calendar year.

ON-CALL EMPLOYEES:

- Issue: There are two categories of on-call employees: (1) on-call firefighters and EMTs, who are currently statutorily exempt from receiving UI benefits and (2) a more general group of assorted classifications of on-call employees, including substitute teachers.
- Recommended Solution:
    - For on-call firefighters and EMTs, the DUA has issued and disseminated (on March 20, 2012) a Guidance Letter that explains how municipalities can avoid UI charges for these groups of employees by properly identifying them when they file claims.
    - For other on-call employees, including substitute teachers, it is recommended that DUA affirm and uniformly apply the rule that a part-

time, intermittent employee is disqualified from receiving UI benefits for any week in which the employer offers at least one hour of work or the employee actually works for one hour or more.

- Key Outcome: With additional education and training, municipalities should be able to completely eliminate UI benefits to appropriately designated on-call firefighters and EMTs and better control and reduce UI costs to other on-call employees through increased coordination and reporting of when work is offered or accepted.

METHOD OF CONTRIBUTION TO UI SYSTEM BY MUNCIPAL EMPLOYERS:

- Issue: Consideration of whether municipal employers are best served, in general, by self-classifying as reimbursable or contributory employers and the implications of the classification selection. "Contributory employers" (private companies are required to be contributory employers) contribute to the UI Trust Fund based on an insurance model of paying a quarterly UI assessment based on an experience rating. "Reimbursable employers" (available only to non-profits and public employers) essentially self-insure their UI costs since each UI claim is paid and covered, dollar-for-dollar, by the reimbursable employer.
- Recommended Solution: After review and analysis, it was determined that no changes be recommended at this time. The vast majority of municipalities choose to be reimbursable employers and the analysis demonstrated that over time significant savings were achieved by electing and remaining reimbursable employers.
- Key Outcome: While it is recognized that the reimbursable model has presented some financial challenges to municipalities in recent years, largely due to the recent recession, it is still the economically preferable method for most municipalities to manage and control their UI costs. Municipalities are, nevertheless, encouraged to reach out to DUA to discuss the advantages and disadvantages of selecting between the contributory or reimbursable model.

PROCESS, POLICY, AND PRACTICE:

- Issue: Ensuring best practices at the DUA so that its requirements are uniform and understood by employers, while providing the appropriate balance between employers and claimants. Ensuring best practices within municipalities, so that municipalities can best manage their UI costs.
- Recommended Solutions: The Task Force recommends a number of policy and procedural changes that DUA either has or will implement to ensure better access by municipalities, uniform policies and enforcement, and greater responsiveness to municipalities. It also recommended to municipalities that they better manage

their UI issues, which would include better coordination within local government, increased responsiveness to DUA, and ensuring that local officials and third party agents are coordinating their efforts. Included in these best practices are continuing collaboration between DUA and municipalities, a DUA unit dedicated to municipal issues, formal educational seminars, webinars, and regular dialogue.

- Key Outcome: The ability on all sides to work through issues, recognize responsibility, and implement changes will lead to better communication, management, and outcomes and will help control the cost of UI charges to municipalities.

SUMMARY AND CONCLUSION:

The Task Force is confident that it has addressed the major issues raised by municipalities and has fulfilled its mandate from the Governor. The combination of legislatives changes, DUA policy and procedural changes and commitment to enforcement, and municipalities' recognition of their need to better manage their UI costs will lead to a better system that is collaborative and fair and that will provide economic relief to cities and towns. The result of these reforms will be of great benefit to municipalities and taxpayers by reducing their UI costs.

INTRODUCTION

Governor Patrick established the Municipal Unemployment Insurance Task Force (Task Force) in March 2012 to consider several issues involving municipalities[1] and the eligibility of their employees, including retired public employees, for Unemployment Insurance (UI) benefits. The Governor charged the Task Force with making recommendations that would provide relief to municipalities while maintaining the integrity of the UI system, respecting the rights of unemployed workers with valid claims, and ensuring the UI system's continuing conformity with federal requirements. The Task Force has taken its mandate seriously and issues this report with recommendations which meet the Governor's stated goals.

Governor Deval Patrick initiated this review after receiving a letter from a town in March, 2012, requesting his assistance in addressing several concerns regarding the payment of UI benefits to municipal employees. The letter highlighted a case involving a retired police officer who was called back to work and, after stopping work, applied for and was awarded UI benefits based on his post retirement earnings.[2] The letter also raised several additional UI issues. It was signed by officials from 17 additional cities and towns. (Attachment 1)

Upon receipt of the letter, the Governor's office forwarded it for review and response to the Executive Office of Labor and Workforce Development (EOLWD), the Secretariat in which the Department of Unemployment Assistance (DUA)[3] is situated. EOLWD undertook a review of the issues raised and began the process of addressing them.

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1. The term municipalities includes all local public employers, cities and towns, school districts, water districts and all other local public entities that hire employees and are under the UI system.

2. Although identifying information about a particular claimant and this case were published in local media and discussed publicly, the Task Force is unable to address the particular case. DUA did not present any individual cases to the Task Force and confidentially handled any that were raised. Chapter 151A, § 46 contains stringent requirements to make "confidential and for the exclusive use and information of the department [DUA]" all information regarding specific claimants, employers, and claims. Because § 46 prohibits the disclosure of such information, the Task Force did not consider and is unable to discuss particular cases in this report, regardless of the accuracy or inaccuracy of what has been publicized.

3. DUA is the state agency which administers the UI program for all employers and all claimants in the Commonwealth.

EOLWD identified the following eight categories:

1. retired public employees who are called back to work by municipalities and then reach either the statutory cap of 960 hours of work or a formula-based earnings cap in a calendar year, often referred to as "960 employees";

2. public safety employees who retire upon reaching the statutorily mandated retirement age of 65;

3. nontenured public school teachers who receive notice that their contracts will not be renewed for the subsequent school year, but over the summer the teacher is rehired by that school system or another public school system;[4]

4. retired public school educators who are rehired or hired by a school system due to a critical need of that municipality, and are therefore without any earnings limitation, and then replaced or laid off;

5. school bus drivers, paid by municipalities rather than directly by school departments, for periods when the schools are closed, including summers, school vacations, and professional development days;

6. call firefighters, who work for a municipality on a part-time basis and have a full-time job with a different employer, when they lose their full-time job;

7. part-time municipal employees who were laid off from their other, primary employers, and for whom the municipality was charged part of the cost of the employee's UI benefits because the primary employer had reached its maximum required contribution to the UI benefit; and

8. individuals employed as reserve police officers who are hired as full-time officers but later returned to reserve status because they fail to obtain a passing grade from the police academy.[5]

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4. The statutory date for notification to educators of non-renewal is June 15. Any earlier date is applicable if collectively bargained between the municipality and the teachers' union.

5. This particular concern seems to be situation-specific and did not emerge as a theme or problem to municipalities more broadly. Therefore, it was not part of the deliberations of the Task Force.

Once these issues were raised, the Administration quickly and effectively moved to address them. A comprehensive approach was developed by EOLWD to make sure that all the issues raised would be reviewed.

Accordingly, the following steps were taken:

1. In March 2012, EOLWD Secretary Joanne Goldstein wrote to all 351 cities and towns and a number of school districts, recognizing their frustration when claimants receive UI benefits improperly or due to statutory or regulatory requirements and acknowledging the financial burden those cases place on municipalities. She confirmed EOLWD's commitment to address these issues and invited all municipalities to provide information on individual cases that they found problematic and their interest in and positions on a number of the thematic issues that had been brought to the attention of EOLWD. (Attachment 2)

   EOLWD received responses from 109 municipalities. The responses ranged from no issues with DUA or UI to responses that included concerns or questions about specific cases or UI policy issues.

2. On March 7, 2012, the Governor filed legislation, entitled "An Act Disqualifying Certain Persons Subject to G.L. c. 32, Section 91(b) from Receiving Unemployment Insurance Benefits" which would disqualify the 960 employees from UI eligibility. (Attachment 3)

3. On March 14, 2012, Secretary Goldstein extended an open invitation to all 351 Commonwealth cities and towns to attend a town hall meeting scheduled for March 20, 2012 to discuss the municipal UI issues that had been identified, raise any additional concerns, and hear a presentation by DUA Acting Director Michelle Amante on municipal UI issues. (Attachments 4, 5)

4. The meeting was held on March 20, 2012 at the Boston Public Library. Twenty-two cities and towns sent representatives. In addition to the discussion and presentation, DUA provided to all participants a guidance letter, dated March 20, 2012, on the exemption of UI benefits and charges for On-Call Firefighters and EMTs. This letter summarized the current legal status of these employees; namely, when properly reported as such to DUA, cities and towns are not charged and employees are not eligible for UI benefits based on these wages. The guidance letter was also posted on DUA's website. (Attachment 6) Those municipal officials who were present were also provided with the aggregate statistical data on case volume and outcomes and other statistical and procedural information regarding municipalities. (Attachment 7)

5. Based on a suggestion of a participant at the meeting, DUA reestablished a dedicated telephone line for municipalities to utilize for questions or concerns regarding UI. That number is 617-626-6262. The line remains fully operational and DUA intends to maintain it, along with a special team for municipal UI issues.

6. On March 29, 2012, Secretary Goldstein again reached out to all 351 cities and towns, providing an update on the identified issues, distributing the materials from the March 20, 2012 meeting and noting that all individual cases brought to DUA's attention were being reviewed. (Attachment 8)

7. On March 31, 2012 the Governor formed the Municipal UI Task Force and requested it to fully consider and review the UI issues that had been raised by municipalities and provide a summary, conclusions and recommended actions in a final report.

   The Task Force is chaired by Secretary Goldstein. Its members are: Mayor Kim Driscoll (Salem), president of the Massachusetts Mayors' Association; Mayor Setti Warren (Newton); Hon. Raya Dreben, Associate Justice of the Appeals Court (ret); Michael Widmer, president of the Massachusetts Taxpayers Association; Paul Toner, president of the Massachusetts Teachers Association: Jennifer Springer, Vice President, Massachusetts AFL-CIO; Senator Daniel Wolf (Harwich); and Representative David Torrisi (North Andover). Representative Torrisi was appointed by House Speaker Robert DeLeo. Senate President Therese Murray appointed Senator Wolf. All other members were appointed by Governor Patrick.

8. On April 18, 2012 the Task Force held its first meeting.

9. On April 19, 2012, the Joint Committee on Public Service held a public hearing on the Governor's proposed bill (H. 3980). Secretary Goldstein, a Massachusetts Municipal Association (MMA) panel consisting of four representatives, and several others testified in support of the proposed legislation.

10. On May 2, 2012, Secretary Goldstein made a further inquiry of all cities and towns with respect to the number of retired employees who have received UI benefits from subsequent public employment. (Attachment 9) Thirty-one municipalities responded, identifying 21 cases.

11. Subsequent meetings of the Task Force were held on May 8, 2012, June 5, 2012, September 6, 2012 and October 25, 2012.

12. Since March, EOLWD and DUA have also engaged with interested stakeholders on these issues. There have been meetings and conversations with legislators and their staff, the MMA and several of its committees and subcommittees, other municipal organizations, unions representing public employees, municipalities, employees, retirees, taxpayers and other interested parties. DUA has responded to every inquiry, request, or concern presented by a municipality over the past six months. EOLWD and DUA have expressed their continued receptivity to comments, concerns, and suggestions from all interested parties. Further, DUA has conducted research and analyses of the issues in order to provide the Task Force with the information necessary to make informed and meaningful decisions and recommendations. DUA also had multiple conversations with the U.S. Department of Labor staff to ensure that the Task Force's recommendations would be acceptable under federal law.

This report sets forth the findings, conclusions, and recommendations of the Task Force. It includes proposed changes, both legislative and those that can be accomplished by regulation or policy. It recognizes the changes in policies and procedures already implemented by DUA, and recommends some additional ones. It also suggests ways that municipalities can better manage their UI costs, by more closely monitoring the claims process, sending timely and accurate responses to DUA, and improving internal communication within relevant municipal departments.

The Task Force also endorses the proposed collaboration between DUA and municipalities for continuing partnership, education, dialogue, cooperation, and attention to unique municipal issues and needs within the UI system.

DUA REVIEW OF SPECIFIC CASES REPORTED BY MUNICIPALITIES

As part of its outreach to municipalities, DUA invited them to identify particular cases of concern. The 109 municipalities identified a total of 473 claimants dating back to 2002. DUA assigned a team of four staff members to review every case that had sufficient identifying information. In each of these cases, the team conducted a full review. DUA has the statutory authority to make adjustments to claims within one year of the original determination, and therefore, the 401 cases that had been decided within that time frame were reviewed and, if warranted, adjusted. DUA made 44 case adjustments as a result of its review. The adjusted cases primarily involved: situations where the municipality had not received the claim approval notice, firefighter/EMT wages that had to be removed or cases where the municipality was not properly identified as a subsidiary employer.

For claims where DUA concluded that a correct decision had been made, or where the applicable statute of limitations for a redetermination had run, DUA provided explanations directly to the municipality. Additionally, DUA carefully examined all of the issues raised in these cases, whether procedural or substantive, and incorporated these results in its findings to the Task Force. DUA continues to invite municipalities to voice concerns on particular cases.

METHOD OF CONTRIBUTION AS FACTOR IN MUNICIPAL UI COSTS

The UI system, which recently observed its 75th anniversary, was established by Congress through the Social Security Act in 1935 as a safety net of benefits for individuals who become unemployed through no fault of their own. The system, which is a federal-state partnership, is funded through assessments on employers directly and by the federal government. It is an insurance system for the private sector and either an insurance or self insurance system for nonprofit and public employers, who may elect either option.

In Massachusetts, private sector employers pay unemployment contributions on the first $14,000 of wages per employee per year. The contribution rate applied to employees' wages is calculated through a formula that takes into account:

- the amount of contributions the employer paid into the system for the previous year, and
- the unemployment benefits that were charged to that employer's account during the previous year.

These monies are deposited into the UI Trust Fund to pay benefits to claimants. As these employers contribute monies to the UI Trust Fund, they are referred to as "contributory employers". They also pay a solvency surcharge into the Solvency Fund to cover excess charges for dependency allowances, training benefits, charges assessed as subsidiary employers, and benefits incorrectly paid to claimants.

In addition, each private sector employer pays a FUTA (Federal Unemployment Tax Act) contribution to the federal government. These funds are distributed by the U.S. Department of Labor to all states for the operation of the state's UI system.[6]

Federal UI law allows nonprofit (501(c)(3)) and governmental employers[7] the option of paying for UI benefits under either the contributory model, somewhat similar to the one used by private employers, or through the reimbursable method.[8] If a governmental employer elects the contributory model, its calculated contribution rate is applied to its

[6] Municipalities do not make FUTA contributions, which fund the operation of DUA.

[7] The vast majority of employers in the UI system are in the private sector – 97.1%. Only 0.5% is public sector and 2.4% are nonprofits.

[8] The term reimbursable employer is used throughout the report to describe an employer that utilizes the reimbursable method of payment, not an employer that is reimbursed by DUA.

full payroll, not just on the first $14,000 of annual wages per employee. Sixty seven cities and towns have elected the contributory model.[9]

The other option for municipalities and nonprofits is to pay dollar-for-dollar for UI benefits, which is known as the reimbursable method of payment since the employer reimburses the UI Trust Fund for every allowed claim. The vast majority of public employers and nonprofits choose this option, essentially self-insuring their UI costs.

Historically, the reimbursable method has been financially advantageous for municipalities to cover their UI costs. Since municipalities have a fairly stable workforce and are not generally subject to wide fluctuations in staffing levels and have fewer layoffs, the reimbursable method of UI coverage has over time cost municipalities less than they would have paid as contributory employers. Although costs are not predictable from year to year, they have been sufficiently low and manageable.

That changed in 2008 when the recession hit. Cities and towns were not immune to the economic downturn and when faced with declining revenues, many municipalities reduced their workforces. As reimbursable employers, most municipalities had to cover unemployment benefits paid, dollar for dollar. This significantly increased municipalities' UI costs.

Municipalities also faced UI charges based on "subsidiary employment". When an individual works two or more jobs, one is treated as primary and additional jobs as subsidiary. During the recession, some part-time municipal employees were laid off from their primary jobs, which may have resulted in municipal employers being required to share in the UI costs for these employees. This occurs when the primary employer reaches the maximum amount it can be charged. In these situations, the municipality, as the subsidiary employer, must share in the cost of the UI benefits paid, even if the individual is still employed by the city or town. At most, the maximum charge to a municipality as a subsidiary employer is only 36% of the wages it paid to the employee during the base period of the claim.[10]

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[9] Governmental employers can transfer between contributory and reimbursable methods of payment by filing with DUA a notice of the election to switch between December 1 – 31st for the following calendar year. Once changed, the employer is obligated to stay with that system/method for a two-year period before it can again change its election. If the governmental employer switches its method of payment from reimbursable to contributory, its first two years are set at a federally mandated rate. This option is not often exercised.

[10] A number of towns expressed frustration that they were responsible for UI benefits for part-time employees, particularly when they were still employed by the municipalities and on UI because they had been laid off from their primary employment. The Task Force recognizes the concern but would note that (1) in over half of these cases the municipality was not actually charged any costs as a subsidiary employer, (2) even when the municipality was charged, in most cases, only a small amount was involved since the maximum charged was only 36% of the part-time municipal wages paid and (3) as reimbursable employers, there is no other source of money available to pay these benefits.

Finally, reimbursable employers are liable for certain UI costs not charged directly to contributory employers. These costs include the weekly dependency allowance ($25 per dependent), training benefits, and benefits incorrectly paid, irrespective of the reason, until the claimant pays back the improperly paid benefits.[11] These charges are incurred by reimbursable employers, because, unlike contributory employers, they do not pay into the UI Solvency Fund which covers these costs, and there is no other fund or source from which to pay these mandated benefits.

The Task Force found that the UI statutory system is complex and can be difficult to navigate. Under the existing, long-standing state benefit structure, UI claimants in Massachusetts are entitled to up to 30 weeks of benefits[12], paid by the employer through the state system. In 2009, the American Recovery and Reinvestment Act established a structure for Emergency Unemployment Compensation (EUC), which has been paid in four separate tiers. These benefits were covered 100% by the federal government for all UI claimants. In addition, after the state unemployment rate reached a certain percentage, it triggered Extended Benefits, which was a 13 or 20 week program, depending upon the state unemployment rate. When an extension is in effect, regular benefits are paid through week 26; extension benefits begin on week 27 of the claim.

At the depth of the recession (November 2009), up to 99 weeks of unemployment benefits were available to eligible claimants. Below is a breakdown of the extensions that allowed for the maximum 99 weeks of benefits:

- Regular UI benefits from the Massachusetts unemployment program – 26 weeks
- EUC Tier 1 – 20 weeks[13] (still in effect)
- EUC Tier II – 14 weeks (still in effect)
- EUC Tier III – 13 weeks (ended June 2012)
- EUC Tier IV – 6 weeks (ended December 2010)
- Extended Benefits (EB)- 20 week program (ended July 2011), 13 week program (ended April 2012)

[11] DUA already participates in the Department of Revenue Tax Offset Program which allows it to capture state tax refunds to offset UI benefits improperly paid. One of the proposals, as noted in section "Steps Taken by DUA" is a legislative proposal that would allow DUA to participate in the US Treasury Offset Program, thereby intercepting federal tax refunds as well. Once these monies are recovered from public employees, they are repaid to the municipality.

[12] It should be noted that due to federal extensions, no Massachusetts employer, private, public or non-profit has paid weeks 27 through 30 since November 2008. Those weeks have been paid by the federal government for all claimants.

[13] Tier I has been reduced to 14 weeks for new claimants effective September 2, 2012. Both Tier I and Tier II will expire for the week ending December 29, 2012, absent any vote by Congress to further extend these benefits.

Under these extensions, contributory private employers were charged for weeks 1-26; all subsequent benefits were paid by the federal government. Governmental reimbursable employers were charged for weeks 1-26, the federal government paid for all Tiers of the EUC program, but municipalities were then responsible for the 13 to 20 weeks of Extended Benefits, the last weeks to be paid on the claim (weeks 79 through 99). This responsibility became costly for municipalities.

Many municipalities were unaware that they were responsible for paying Extended Benefits. Since Extended Benefits are the last to be paid, there could have been a lag as long as a full year between the time when the municipality's responsibility for regular benefits of 26 weeks ended and its responsibility for Extended Benefits began. This unanticipated cost was a source of frustration to many municipalities.

Municipalities also voiced complaints regarding their responsibility when benefits are initially disbursed but later determined to be incorrectly paid. Reimbursable employers are only entitled to a refund of these payments, called "overpayments"[14], when the Commonwealth recovers the payment from the claimant. Overpayments can occur for many reasons: an original determination reversed at a hearing; a claimant's failure to report earnings in a particular week; or the municipality's failure to present accurate or thorough information at the time of the initial determination. DUA has advised that it will continue to aggressively pursue recovery of overpayments. DUA already has the statutory authority to intercept state tax refunds to recover benefit overpayments. The Task Force is recommending legislation that would also authorize DUA to participate in a federal program that allows the interception of federal tax refunds to recover benefit overpayments.

While the cost of UI was high for municipalities in 2009, 2010 and to a lesser extent in 2011, this cost will unlikely continue to be the same financial drain on municipalities in 2012 and beyond (Attachment 10). As Massachusetts has successfully come out of the recession and its unemployment rate continues to hold steady at around 6%, the maximum number of weeks of UI benefits available to claimants has correspondingly decreased. The precise declination in number of weeks is noted above and as of this date the number of weeks is now down to 54. The EB program ended as of April 7, 2012 so this cost is no longer incurred by municipalities. This is likely to reduce municipal UI costs further.

It should be noted that cities and towns, as well as all nonprofits, may protect themselves against future UI spikes by shifting to a contributory model. Analysis by DUA for the Task Force suggests that such a change is unlikely to be financially beneficial for most public employers. (Attachment 11) Looking back since 1999, and amortizing UI costs

[14] An overpayment is a technical term used to describe a weekly payment that was ultimately determined erroneous or for an amount in excess of what should have been paid.

over that period, most reimbursable cities and towns paid less in UI costs than they would have as contributory employers even with the higher costs incurred during the recession. The Task Force nevertheless urges all cities and towns to evaluate and determine which system best meets their particular needs. DUA has offered to assist interested cities and towns with this analysis.

The Task Force recognizes that the reimbursable model has presented some financial challenges to municipalities in recent years, largely due to the recent recession, but concludes that it is still the preferable method for municipalities to manage and control their UI costs. Although an initial look at the contributory model has appeal for municipalities, when its requirements, such as a fully taxable wage base, the rate of contribution, and the two year lock are considered, in light of the municipality's historic UI costs, most municipalities will likely decide to remain with the reimbursable model.

The Task Force also considered two additional ideas on the reimbursable/contributory issue for municipalities. The first idea was to redesign the current contributory model for governmental employers to make it more affordable while still enabling the model to sustain the costs of municipal UI. The second, either as part of the first, or a stand-alone possibility, was to create a Reimbursable Employer UI Solvency Fund, which would be built up to the financial point where it could cover excess municipal UI costs. The Task Force concluded that neither of these options is currently feasible but should be kept in mind as ideas for possible future development. The effort and cost necessary to design a new contributory model is enormous and may not yield sufficient benefits to warrant this overhaul. It would entail a full financial analysis of the system, a determination of appropriate wage base rates, legislation and an assurance that the model would be economically sustainable. The establishment of a solvency fund would require an assessment on municipalities and other reimbursable employers. The Task Force unanimously concurs that this is not the time to put an additional financial burden on municipalities and that there is little interest among municipalities to create such a fund. However, the Task Force suggests the concept of a municipal employer solvency fund remain available for possible future consideration.

PUBLIC SECTOR RETIREMENT ISSUES

The Task Force considered issues of particular concern to municipalities regarding the eligibility for UI benefits of three groups of retired municipal employees. The first group consists of retired public employees who return to public employment but then stop working because of statutory limits on the number of hours public retirees may work for a municipality—960 hours in any calendar year—and on the amount a retiree may earn during a year.[15] The second group is made up of public employees, principally firefighters and police officers, whom state law compels to retire when they reach age 65. The third group consists of retired public school educators who, in the event of a "critical shortage of certified teachers," may be hired without regard to the otherwise generally applicable caps on hours and earnings.[16] In considering these issues, the Task Force has been mindful of the federal requirement that, with limited exceptions, private and public employees must be treated equally regarding UI eligibility and benefits. The Task Force is proposing a single legislative change that addresses all three issues and would apply to both public and private sector retirees.

960-Hour Employees

Of particular concern to municipalities is an exception that allows public pensioners to be employed in public service for not more than 960 hours in any calendar year, provided that the wages paid, when added to the individual's pension, "do not exceed the salary that is being paid for the position from which [the individual] was retired . . . plus $15,000[.]"[17] These rules apply on a year-by-year basis, so a public pensioner who reaches a cap in one year may again be employed and paid, subject to these limits, in a subsequent calendar year.

Some municipalities object to paying UI benefits to these 960-hour employees, because the separation from work is not the municipality's decision; rather, it is mandated by § 91(b). Under federal law, however, this mandate is not a disqualification for UI eligibility. Generally, employees who are out of work through no fault of their own are entitled to UI benefits. This principle applies regardless of whether the cessation of work is due to a statutory mandate, an action of the employer, or some independent reason not attributable to the employee.

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[15] G.L. c. 32, § 91(b).

[16] G.L. c. 32, § 91(e).

[17] G.L. c. 32, § 91(b). During the first year of retirement, the earnings limitation does not include the additional $15,000. *Id.*

Public Safety Employees who are Mandatorily Retired at Age 65

Under current law, a public safety employee who is compelled to retire on reaching age 65 is entitled to UI benefits, if otherwise eligible.[18] In most cases, public retirees are subject to a pension offset in their first year after retirement, because the public employer from whom they retired will have been primarily responsible for their pension[19]. When the offset applies, 50% of the employee's weekly pension amount is deducted from his/her weekly unemployment benefit.[20]

Critical Needs Educators

Under current law, "in any period during which there is a critical shortage of certified teachers available for employment in a school district," the district may employ a retired educator[21] without regard to the 960-hours and earnings limitations.[22] When that post-retirement employment ends, the "critical needs" educator, if otherwise eligible, is considered entitled to UI benefits because the separation from work came about through no fault of the educator.

On March 7, 2012, the Administration filed legislation to address the 960-hour employees' UI eligibility. At the time of filing, the Administration noted that the 960-hour employee issue was only one of several regarding public employee retirees. The bill was referred to the Joint Committee on Public Service Committee, which held a hearing on April 19, 2012. The Administration committed at the time to providing a more comprehensive resolution of these issues once it had been thoroughly reviewed and discussed with the Task Force. This report contains a recommendation for a more comprehensive bill, which addresses multiple issues involving public sector retirees and would supplant the initial legislation filed in March.

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[18] G.L. c. 151A, § 25(e) (third paragraph). The Supreme Judicial Court enforced this provision in *White v. Director of Div. of Employment Security*, 382 Mass. 596, 598 (1981), and *O'Reilly v. Director of Div. of Employment Security*, 377 Mass. 840, 845 n.13 (1979).

[19] To the extent that DUA is able to track UI benefit eligibility to public retirees, it found that the number of claimants who also had pensions in 2011 was negligible. A review of 2011 claims indicated that less than 1% of all municipal claims, or just over 100 claimants, could potentially be claiming UI benefits while receiving a pension from a city or town.

[20] G.L. c. 151A, § 29(d).

[21] Although the statute uses the term teachers, administrators are also included and this report references the larger group as educators.

[22] G.L. c. 32, § 91(e). The earnings limitation does apply during the first two years following a teacher's retirement. *Id*.

Proposed Solution

The issues involving retirees are the most complex presented to the Task Force. Municipalities argue that it is fundamentally unfair to require the payment of both UI and pension benefits from the same public employer. Retirees, retiree representatives, and public employee unions claim that post-retirement employment is a matter of financial necessity for some workers, because the average annual public employee pension is only $28,000. They also say that the municipality chooses whom to hire and benefits from hiring a public sector retiree because that person brings expertise to the position at a lower cost than someone to whom higher wages and/or additional benefits would also have to be paid. Finally, they argue that public employee retirees are being singled out and treated differently than most retirees in the private sector, who often return to work, albeit usually for a different employer, and may be eligible for UI benefits based on their post-retirement wages.

In addition to the complexities mentioned above, the Task Force had to consider the requirement that Massachusetts UI legislation be compliant with federal law as required by the United States Department of Labor (US DOL). The US DOL staff has consistently advised DUA that any change in UI eligibility for public sector retirees must also apply to similarly situated private sector retirees. This required extended deliberation by the Task Force, knowing that its recommendations would also apply to employers and claimants in the private sector.

After a thorough review of data, arguments and proposals, the Task Force is recommending a statutory change that would address the issues raised with respect to retiree eligibility for UI benefits, consistent with US DOL mandates and provide a fair and balanced result for retirees as well as for those employers, both public and private, who contributed to the pension plan. The legislation would reduce or eliminate the UI benefits of all retirees, public and private, who receive a defined benefit pension, when their post-retirement wages are paid by an employer who contributed to the defined benefit pension as long as seventy five percent or greater of their years of service were for said pension contributing employer. Although such a retiree would continue to be eligible for UI benefits, the proposed new section (§ 29(d)(7)) would reduce the retiree's weekly UI benefits by an amount equal to 65% of the retiree's weekly pension payment.[23] This 65% deduction takes into account the fact that the employee has also contributed his/her own earnings to the pension plan and should not have his/her own contribution offset.

[23] The Task Force concluded that the 65-35% ratio provides the appropriate balance and equity to the calculation of the contribution and risk factors in a defined benefit plan and takes into account the employee contribution to his/her own pension plan. The amount of the employee contribution may be higher than 35%, but the employer, through the pension plan, assumes the liability for the full pension based on actuarially based risk factors. Since it is impossible to calculate each retiree's exact contribution or foresee the actual interest calculation, it was necessary to do a pre-determined, universal amount in a balanced manner.

The Task Force's proposed solution addresses all three of the issues raised with respect to public sector retirees and it treats private and public sector employees similarly.[24] The proposed statutory language is as follows:

> SECTION 1. Section 29 of chapter 151A of the General Laws, as appearing in the 2010 Official Edition, is amended by inserting after subsection (d)(6) the following new subsection (d)(7):
>
> (7) Notwithstanding any of the foregoing provisions of this subsection, the amount of benefits otherwise payable to an individual for any week that begins in a period with respect to which such individual is receiving governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment from a defined benefit plan that is based on the previous work of such individual for the separating employer or for a base period employer shall be reduced by an amount equal to 65% of the amount of such payment that is reasonably attributable to such week; provided, however, that such reduction shall apply only when such separating or base period employer employed the individual for at least 75% of the individual's total length of service on which the defined benefit plan is based; and provided, further that such reduction shall apply only if, and to the extent, then consistent with section 3304(a)(15) of the Internal Revenue Code of 1954. Payments received under the Social Security Act shall not be subject to this paragraph.

Expected Outcome

After careful consideration, the Task Force has concluded that its recommended statutory change best addresses the issues raised by municipalities while preserving the integrity of the UI law and the state's obligation to meet U.S. Department of Labor requirements. Further, under the proposed offset ratio, only those retirees with smaller pensions are potentially able to receive UI benefits. Individuals whose annual pension allowance is $53,920 or higher would not receive any UI benefits, even though technically eligible, because their pension offset would be the same or greater as their UI benefit amount.[25] Further, as noted in Attachment 12, UI eligible retirees, even with smaller pensions, will

[24] Like all of the Task Force's proposed legislative changes, the proposals will need to be approved by U.S. Department of Labor and be compliant with federal unemployment tax law.

[25] This amount is based on the current maximum weekly benefit amount, which is subject to change on an annual basis. The Task Force concluded that this is an appropriate threshold, addressing the concerns expressed for public retirees who receive small pensions and those who are receiving pension benefits of a larger amount.

not receive UI benefits when the ratio of their earnings to their UI benefits is at a certain threshold. The Task Force is mindful of the concern that an individual not receive a double benefit from the same employer; namely a pension and later UI benefits. [26] Its proposed solution addresses this concern. If an employer was the majority contributor to the defined benefit pension plan, its contribution is offset against the UI benefit. As such, an individual is only getting a single benefit from a particular employer. Overall, the Task Force has concluded that this statutory change manages the issue of public and private sector retirees with a balanced, fair and fiscally responsible approach.

[26] Although the public often views all public employees as belonging to one pension system, in fact, most municipalities have their own municipal pension systems for their employees. This proposal recognizes that reality and ensures that municipalities who primarily fund the pension are largely protected from paying UI benefits for their retirees.

ISSUES INVOLVING SCHOOL DEPARTMENTS AND SCHOOL-BASED EMPLOYEES

Before 1970, the Federal Unemployment Tax Act (FUTA) did not require states and municipalities to pay UI benefits to employees of educational institutions. When Congress amended FUTA to require states to amend their laws to cover these employees, Congress also provided a "reasonable assurance exception" that prohibits the payment of benefits in specified circumstances where a school employee, employed directly by the school department, who is out of work between academic terms (such as the summer) or during an established vacation period or holiday recess, has a reasonable assurance of reemployment following the break. In 1972, Massachusetts enacted this reasonable assurance prohibition in G. L. c. 151A, § 28A. (Attachment 13)

Three issues concerning school-based employees were brought to the attention of the Task Force. The first involves individuals who perform services for a school department but who are employed and paid by a non-school municipal agency. Since these employees are not employed directly by the school department, the reasonable assurance exception does not apply. The second concerns the entitlement of educators who have not received reasonable assurance but do draw a paycheck and health care benefits and receive UI benefits over the summer. The third, involving on-call substitute teachers and reasonable assurance to that category of teachers, is discussed in the On-Call Employees Section.

Individuals Performing Services for a School Department Who Are Not Employed by the School

Many municipalities noted that the reasonable assurance exception does not extend to school department employees—particularly bus drivers, crossing guards, food service workers, and custodians—who work in the schools but are employed and paid directly by other municipal departments. Hence they are eligible for UI benefits when not working, regardless of whether school is in session or there is work to be performed, and regardless of whether they have an expectation of returning to employment. Cities and towns have expressed particular concerns about school crossing guards employed by police departments and school bus drivers employed by municipal departments other than the public schools. This has become an increasing concern as many municipalities have shifted non-instructional school employees to non-school municipal payrolls.

Public employees working in school related positions should be treated alike for purposes of UI eligibility, regardless of whether they are paid under a municipal or school department budget. This provides consistency among and within municipalities for categories of employees working in the schools regardless of which municipal department is technically budgeted to pay the employees. The Task Force recommends

amending Section 28A of Chapter 151A to apply the reasonable assurance exception to all municipal employees who provide services for the municipality's schools.[27]

Legal Framework and Analysis

As noted above, § 28A does not cover non-school department employees who perform services in or for the public schools. This is the view of both the U.S. Department of Labor and the Supreme Judicial Court. [28,29]

But FUTA permits, and the Task Force proposes, extending the reasonable assurance exception to employees of non-educational governmental employers, such as a municipal government, its police department, or its department of public works, who provide services "to or on behalf of an educational institution[.]"[30]

Two members of the Task Force, Senator Wolf and Jenn Springer, noted their dissent on this proposed solution for non-school based public employees who provide services to schools. They note that many individuals in these categories of employees are vulnerable and low wage workers, for whom the UI benefits have become part of their income and on which they depend to exist. Municipalities are fully aware that these employees receive UI benefits and consider them in setting wages, and therefore, Senator Wolf and Ms. Springer are unable to endorse this proposal as a matter of public policy and fairness and equity to these employees. However, recognizing that the majority of the Task Force supports it, they would suggest that the enactment or effective date of this legislative proposal be sufficiently postponed so that collective bargaining can occur that would take into account this sudden change in total compensation to these employees.

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[27] The Task Force is aware that many municipalities contract out school bus service to private companies and, therefore, those school bus drivers are private sector employees. There are structural differences between public and private bus drivers. Drivers who work for municipalities or school departments are public employees with both the rights and restrictions of said employment. The drivers who work for private companies have a different pay and benefit structure. Issues concerning private sector bus drivers were outside the scope of this report.

[28] The U.S. Department of Labor's view is based on communications from the State Conformity and Compliance Team in the U.S. Department of Labor (citing as an example U.S. Department of Labor Unemployment Insurance Program Letter No. 41–83 (Amendments Made by P.L. 98-21 (Social Security Act Amendments of 1983), Which Affect the Federal-State Unemployment Compensation Program) (Sept. 13, 1983)).

[29] Based on the current language of § 28A, the Supreme Judicial Court rejected as "wholly untenable" the argument that a school bus driver working for a private entity, or even for the municipality (but not directly for the school department), should be ineligible for unemployment insurance benefits on the grounds that she had a reasonable assurance of reemployment the following school year. *Milton v. Director of the Division of Employment Security*, 386 Mass. 831, 833 (1982).

[30] 26 U.S.C. § 3304(a)(6)(v).

Proposed Solution

Amend G. L. c. 151A, § 28A, to insert a new subsection (e). As amended, § 28A would read, in pertinent part:

> Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:
>
> (e) with respect to any services described in subsections (a) and (b) that are provided by municipal employees to or on behalf of an educational institution, benefits shall not be paid to any individual under the same circumstances as described in subsections (a) through (c).

Expected Outcome

The proposed amendment solves the current problem by extending the reasonable assurance prohibitions of § 28A to all public employees who provide services to public schools, such as crossing guards, cafeteria workers, and bus drivers, regardless of whether they are on the direct payroll of the school department or on another municipal payroll. As a result, all public employees providing services to a public school who have a reasonable assurance of continued employment would be ineligible for UI benefits when there is no work available because school is not in session, whether over the summer or during breaks throughout the school year. This ensures consistency and uniformity for all school employees within and among all municipalities in the Commonwealth.

Reasonable Assurance over Summer Break

Under the Massachusetts education statute, G. L. c. 71, § 41, an educator is eligible for UI benefits if the educator is notified by June 15th or an earlier date if collectively bargained, that he/she will not be renewed for the subsequent school year. Although the statutory notice is structured so that educators must be notified if they are not going to be re-employed, it is more commonly talked about in terms of "reasonable assurance." Under § 41, the failure to give a non-renewal notice constitutes a "reasonable assurance" that makes the teacher ineligible for UI benefits over the summer break. Educators who are timely notified that they will not be reemployed do not have a reasonable assurance and, therefore, are eligible for unemployment benefits.[31]

[31] This is a requirement of federal law. A teacher receiving timely notice of non-reemployment "would not. . . have a reasonable assurance of employment for the next school year and[,] accordingly, could not be denied benefits 'between terms'." Supplement #1 -- Questions and Answers Supplementing Draft Language and Commentary to Implement the Unemployment

The Task Force heard many concerns from municipalities about this UI eligibility factor. An issue frequently mentioned is the UI eligibility of public school educators over the summer break when school is not in session and therefore no work is available. It was noted that teachers may choose to have their salary paid in equal installments throughout the year, including over the summer break, and that they are able to continue on their group health care insurance over the summer break. Although the Task Force is mindful of these concerns, it recognizes that these benefits are statutory and that wage installments or insurance coverage are not factors in UI eligibility. The Massachusetts education statute mandates that "compensation paid to such [public school] teachers shall be deemed to be fully earned at the end of the school year, and proportionately earned during the school year."[32] Because a public school educator does not actually earn any compensation from employment as an educator over the summer following the end of the school year,[33] the receipt of previously-earned salary and health insurance benefits during the summer does not bar eligibility for UI benefits.

The Task Force also notes that UI entitlement for educators over the summer break only affects a small percentage of employees; namely, those with fewer than three years of service. All tenured educators have a reasonable assurance of reemployment and are ineligible for UI benefits over the summer break.

Legal Framework and Analysis

In reviewing its policy and practices for presentation to the Task Force, DUA reports that in many situations, educators who were denied reasonable assurance at the conclusion of the school year were paid UI benefits throughout the summer, regardless of whether they later received reasonable assurance or a new position. The fact that an educator may start the summer break without a reasonable assurance of reemployment, and, therefore, be eligible for UI benefits, does not mean that the educator must be entitled to collect benefits throughout the entire summer. Under § 28A(a) a reasonable assurance becomes effective from the time it is given. The reason is that the disqualification applies only to "any week" during which a covered individual has a contract or reasonable assurance. Hence an educator given a timely lay-off notice who later receives a reasonable assurance would be entitled to UI benefits, if otherwise eligible, only for the weeks preceding the

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Compensation Amendments of 1976-P.L. 94-566, p. 19. The State Conformity and Compliance Team in the U.S. Department of Labor confirm the continuing vitality of this principle.

[32] G.L. c. 71, § 40. "Other language in G.L. c. 71, § 40, makes it clear that the words 'school year' used in § 40 refer to the period during which school is in session." *South Hadley v. Director of the Div. of Employment Security*, 389 Mass. 399, 401 n.3 (1983).

[33] *See South Hadley*, 389 Mass. at 401.

reasonable assurance. This interpretation of § 28A(a) is consistent with the U.S. Department of Labor's understanding of FUTA.[34]

Also, a condition of eligibility is that one "[b]e capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted[.]"[35] In order to receive UI benefits, therefore, a teacher claiming UI benefits because of the absence of a reasonable assurance needs to be actively seeking and available for suitable work during the summer break to receive benefits during that time period, as well as for the subsequent school year to continue to receive benefits thereafter.

Proposed Solution

While the Task Force is mindful of the deep concern and frustration of municipalities that educators can receive UI benefits over the summer even though school is not in session and there is no work, federal law prevents the Commonwealth from statutorily disqualifying these educators from UI eligibility. After much discussion and efforts to narrow UI eligibility for educators during the summer months and other school breaks, DUA has proposed two significant actions, both of which the Task Force endorses. These two actions by DUA will greatly reduce the number of weeks of benefits for employees who successfully claim eligibility for UI benefits over the summer break and correspondingly reduce the charges incurred by the cities and towns.

First, DUA is implementing a system to ensure that, once a school department employee is provided reasonable assurance, the school wages can no longer be used for establishing or continuing benefits on an unemployment claim. This addresses the concern regarding educators who are offered re-employment during the summer. Once that offer is made, regardless of whether it is accepted, no further UI benefits will be paid on the claim.

Second, if an educator is offered a comparable position in another school system during the summer months, that offer will be considered under the reasonable assurance framework and no further UI benefits will be paid on the claim.

In order to implement these two policies, DUA has issued additional guidance and provided training to its staff to explain when the reasonable assurance exception applies and to ensure consistency among adjusters and review examiners. Specifically, DUA will no longer grant unemployment benefits to educators based on the school wages, once DUA is notified and confirms that a reasonable assurance has been provided.

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[34] U.S. Department of Labor, Employment and Training Administration, Supplement #1—Questions and Answers Supplementing Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976–P.L. 94–566 (December 7, 1976) 19. This is still the Department of Labor's policy, according to the State Conformity and Compliance Team in the U.S. Department of Labor.

[35] G.L. c. 151A, § 24(b).

Under this new policy, claimants are entitled to benefits only until the reasonable assurance is provided.

In addition to affirming these policies with DUA staff, DUA will develop a system to advise all school department employees who apply for benefits over the summer break as a result of a non-renewal notification, that they must notify DUA if they are later recalled to their school department position or are hired for such a position in a different system at any time during the summer. The notice will also explain that benefits will cease as of that date.

DUA also intends to advise all school departments[36] through an annual letter of the need to notify DUA when a non-renewed teacher is rehired during the summer for the next school year or when a school department is hiring a teacher not renewed by another school department. This is necessary to ensure that the educator will no longer be eligible for UI benefits based upon the notice of reasonable assurance. These systems will be developed in the coming months and implemented for the summer of 2013.

DUA is also emphasizing to DUA staff that the reasonable assurance exception in § 28A applies when a teacher is offered employment for the following school year by a different educational institution than the one that gave notice of non-renewal. From the time the offer is given, the teacher has a reasonable assurance of a comparable job and is no longer entitled to unemployment benefits. This is based on DUA's interpretation of both the federal and state statutes, which state clearly that the reasonable assurance exception applies "if there is a contract or a reasonable assurance that [the non-renewed teacher] will perform services [in an instructional capacity] for **any** educational institution in the [following school year.]"[37]

Finally, DUA will advise all educators and school department employees that entitlement to UI benefits during the summer months or other breaks in the school year carries an obligation to be available for and actively seeking work while receiving UI benefits and that DUA will carefully monitor compliance with this requirement.

Expected Outcome

The Task Force believes that effective implementation of these initiatives by DUA, especially when combined with cooperation by affected municipalities, will limit the extent of payment of UI benefits to educators over the summer break. This will significantly reduce municipalities' UI liability for school department employees over the

[36] Several Task Force members noted concern from outside stakeholders that these proposed revisions could potentially lead to some municipalities using the reasonable assurance exceptions improperly to affect UI eligibility. DUA has not seen any evidence of this and will monitor the UI claims under reasonable assurance to make sure it does not occur.

[37] G.L. c. 151A, § 28A(a) (emphasis added).

summer months and more fully maintain the intent and integrity of the reasonable assurance law and its implementation. Since federal law prohibits restricting all UI eligibility and benefit payments for educators during the summer months, the DUA initiatives outlined herein and the increased enforcement and compliance efforts will do as much as is legally possible to reduce UI costs for this category of claimants.

ELECTION DAY WORKERS ISSUE

Several municipalities raised concerns that the wages of election workers have been used to obtain UI eligibility, which has resulted in UI benefit charges to municipalities. Since these wages alone are rarely sufficient to reach the threshold of UI eligibility, they become relevant as subsidiary wages (See Section "Method of Contribution as Factor in Municipal UI Costs"). Although not significant in terms of the amount of charges, municipalities object to inclusion of these wages in determining UI eligibility, because of the nature, duration and infrequency of the work.

Legal Framework and Analysis

Although the Federal Unemployment Tax Act (FUTA) generally requires that employees of state and local government be eligible for unemployment compensation in an equal manner as employees of private employers,[38] there are exceptions, most of which are already included in chapter 151A.[39] Massachusetts has not yet adopted a federally permitted exception applicable to service performed as an election official or election worker if the wages received by the individual during the calendar year serving in this capacity are less than $1,000[.][40]

Proposed Solution

Amend G. L. c. 151A, § 6A, to add a new subsection (7). As amended, § 6A would read, in pertinent part:

> The term "employment" shall not include service performed by an individual in the employ of the commonwealth or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of any of the foregoing and one or more states or political subdivisions or Indian tribes if such individual performed such services as:
>
> . . .
>
> (7) an election official or election worker if the amount of remuneration received by the individual during the calendar year for services as an election official or election worker is less than $1,000.

[38] 26 U.S.C. § 3304(a)(6)(A).

[39] One exception that Massachusetts has already adopted is to exclude service by elected officials from UI eligibility. M.G.L. c. 151A § 6A(1)

[40] 26 U.S.C. § 3309(b)(3)(F).

Expected Outcome

If adopted, this statutory change would address the concerns expressed by municipalities. Municipalities would no longer be responsible for UI benefits based upon wages paid to election workers of less than $1,000 per calendar year.

ON-CALL EMPLOYEES

A number of municipalities raised concerns that "on-call" workers have been determined eligible for UI benefits even though the nature of their employment is sporadic and unscheduled, and the employees have no expectation of regular, consistent employment. On-call employees actually fall into two distinct groupings that have different statutory requirements so they will be discussed separately in this report.

On-Call Firefighters and On-Call Emergency Medical Technicians (EMTs)

Workers "serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency[41]" are expressly barred from using their pay for such service to qualify for or calculate UI benefits.[42]. When on-call firefighters and on-call EMTs provide services on a temporary basis in response to emergencies, their services are excluded from the statutory definition of "employment."[43] This exclusion results in their being barred from receiving UI benefits based on these services because G.L. c. 151A, § 6A(5) excludes on-call emergency services from the definition of "employment"; therefore, payment for these services does not count towards establishing eligibility for UI benefits.

It is important to note that this exclusion applies to on-call firefighters and on-call EMTs who are paid on an "on-call basis", that is, per response to an event, either at a flat rate or by the hour. The exclusion does not apply to firefighters or EMTs who are paid daily or weekly, even if it is to be on-call.

To avoid UI benefits and charges, a municipal employer must identify the on-call status of a firefighter or EMT when filing its response to a claim with DUA.[44] It should also be noted that these wages are excluded from UI coverage even when the claimant works for the same municipality and has other, UI eligible wages. Otherwise, DUA will be unaware that the exclusion should apply. To clarify the process for municipalities, on March 20, 2012, DUA issued a guidance letter to cities and towns detailing the necessary procedures. DUA also posted the guidance letter on its website and discussed the issue at a number of forums for municipal employers. (Attachment 6)

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[41] Although the statute has primarily been applied to firefighters and EMTs, as is referenced in the Guidance Letter, DUA has advised the Task Force that it will also apply it to claims involving the other listed emergencies, which occur far less frequently.

[42] G.L. c. 151A, § 6A(5).

[43] *Id.*

[44] These on-call wages are excluded regardless of whether the individual has additional employment with the municipality or another municipality.

Proposed Solution

DUA has already addressed this concern by issuing the previously-mentioned Guidance Letter regarding On-Call Firefighters and EMTs. The Guidance Letter, detailing the necessary procedures for notifying DUA of exempt call firefighter and EMT wages, has been in circulation. DUA will continue to publicize the Guidance Letter so that cities and towns are fully aware of how to respond to claims within this category of employees. This Guidance Letter has been sent via email to all cities and towns, distributed at multiple meetings, posted on the DUA website, and is available upon request. In addition, DUA issued an internal memorandum to staff reiterating these wage exemptions and the processing procedures for these claims and has included "On-Call firefighters and EMTs" in the municipal curriculum for staff. This will also be a topic in DUA's internal training module for municipalities starting in 2013.

Expected Outcome

Municipalities will be better informed of the UI status of on-call firefighters and on-call EMTs and better able to manage any UI claims that are filed. They will have access to all necessary information to complete the process and ensure that benefits are not paid to ineligible employees. DUA will continue to provide support, guidance and education to municipal leaders on this issue and will ensure that its internal procedures are properly managed. As noted above, these measures have been in place since April 2012, and DUA has already seen a decline in the number of on-call firefighters and EMTs approved for UI benefits.

Substitute Teachers and Other On-Call Workers [45]

The category of all other on-call or intermittent workers is complex and subject to several different statutory provisions and policy issues within DUA. This has resulted in uncertainty and often times confusion on how to manage UI claims for this diverse group of employees. Most of the cases brought to DUA's attention involve substitute teachers although other occupations are noted as well.

On-call is defined as having an employment status where an employee works for an employer on an as-needed basis and has no set schedule of hours. When an individual files for UI benefits, both the employee and the employer must indicate "on-call" as the reason for separation. DUA is then charged with reviewing the claimant's status in deciding eligibility.

[45] Employees who hold regular, part time positions with set hours are categorized differently under UI law. Therefore, they are not included in this section and in fact, were not raised as a significant concern by municipalities. Their eligibility and entitlement to benefits is similar to regular full time employees, albeit generally on less wages.

If a claim is open and eligibility is established, the claimant can only receive UI benefits in a given week if he/she did not work at all in the week (even one hour of work is a disqualifying event) or was not offered any suitable work. Employers must monitor their employment practices to ensure that employees do not receive UI benefits in weeks when they are ineligible. In particular, employers must review benefit charge statements to verify that any week in which work was offered or wages were paid to an on call employee was reported to DUA and did not result in charges.

Legal Framework and Analysis

The Supreme Judicial Court's 1984 decision in *Mattapoisett v. Director of the Division of Employment Security*, 392 Mass. 546 (1984), addressed the issue of on-call employees and established the standard for UI eligibility going forward. The court held that "that the Legislature did not intend a part-time employee whose hours vary from week to week to be considered in partial unemployment[46] for any week in which he does not work as many hours as a full-time employee."[47]

At a minimum, under *Mattapoisett* the offer of any amount of work in a week disqualifies an on-call employee from receiving unemployment insurance benefits for that week. Further, although *Mattapoisett* did not address the claimant's eligibility in weeks when the town did not offer him any work, the opinion does not foreclose the possibility that the as-needed nature of the employment contract precludes eligibility even in weeks when no work is offered: "Under the terms of his employment contract he was to work whenever he was needed. The claimant understood that if no work was available in a given week he would not work."[48] A subsequent Appeals Court opinion is to the same effect: "In the *Mattapoisett* case, the Supreme Judicial Court held that a part-time police officer, hired to work irregular hours on a less than full-time basis as a fill-in for absent regular officers, was not entitled, while so employed, to unemployment compensation benefits from his part-time employer." *Bourne v. Director of Div. of Employment Security*, 25 Mass. App. Ct. 916, 916 (1987) (rescript).

DUA takes the position, with which the Task Force agrees, that a part-time, intermittent employee is disqualified from receiving UI benefits for any week in which the employer offers at least some work, even if only one hour, or the employee actually works. [49]

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[46] "Partial unemployment" is a term of art under DUA statutes.

[47] *Id.* at 549

[48] *Id.* at 547.

[49] Substitute teachers also may be disqualified over the summer break and school vacations under the reasonable assurance prohibition in G. L. c. 151A, § 28A (discussed in a previous section of this report).

An example that surfaced in many communities is the lack of communication between the school department employee who calls or monitors the calls for substitute teachers daily with the municipal official who reports to DUA whether the employee has worked or refused work in a particular week. Without that information from municipalities, DUA must rely solely on claimants self-reporting this information on their weekly claim for benefits.

Proposed Solution

The Task Force recommends that municipal employers respond promptly to UI claims of intermittent, part-time workers, and include information alerting DUA to the part-time, intermittent nature of the claimant's work. They also should review charge statements to verify that they have not been charged for any week in which they offered work or paid wages to an intermittent, part-time worker.

DUA has already issued an internal memorandum clearly defining the on-call policy, including substitute teachers. Therefore, in all cases for on-call employees where work was offered or wages paid, the claimant will be ineligible for benefits. DUA will have uniform guidelines for handling all on-call employees which will result in consistent determinations and decisions and eliminate confusion among employers. DUA recognizes that there have been some unintended, inconsistent applications, whether based on regions, different stages in the process or just individuals' differing understandings of the application of the law in this area. DUA has also included information regarding on-call employees as part of the municipal curriculum for staff.

On-call substitute teachers are subject to both on-call rules and the reasonable assurance statute, G. L. c. 151A, § 28A. This means that if there is implied reasonable assurance that the substitute will be performing services in the "period" after a school break, the teacher should be ineligible for benefits. DUA previously interpreted "period" to be one week. Therefore if a substitute teacher did not work or was not offered work the week immediately preceding a school break or the week following a break, the teacher was entitled to benefits for all weeks in which there was no work, including the school break week. DUA has revised its interpretation of the statute. Going forward, when evaluating reasonable assurance for substitute teachers over a school break, "period" will be interpreted as a semester. Therefore, if an on-call substitute works or was offered work in any day in the semester before or after the school break, reasonable assurance applies and he/she is not eligible for benefits.

DUA will provide a more consistent and clear reading of the law for on-call employees. In addition, municipalities will have to provide timely and better information to DUA. A historic review of municipal cases for on-call employees found that cities and towns have often been unresponsive to DUA's requests for information, filed erroneous or incomplete information or failed to identify the claimant as an on-call employee or

substitute teacher. Without more accurate reporting, it is difficult for DUA to make fully informed decisions on these claims.

These procedural reforms have been discussed with the MMA, the Massachusetts Mayors' Association and other municipal groups. As noted below in section "Revised Protocol and Procedures," DUA, the MMA and other municipal groups as well as all interested municipal leaders will continue to partner to ensure that this issue is addressed and only individuals truly in unemployment will be eligible for UI benefits.

SEASONAL EMPLOYMENT

A number of cities and towns expressed reservations about the nature of seasonal work exemptions, the scope of its exclusion from UI coverage and how seasonal work is treated. Massachusetts is actually one of only fifteen states[50] to have any limitation on seasonal wages counting towards UI coverage.

In Massachusetts, an employer is allowed to apply for seasonal certification which exempts employees working during the seasonal period from receiving UI benefits at the conclusion of the season.

Seasonal status exempts employment in either of the below categories:

- The entire business is in operation for less than 16 weeks in a calendar year.

- The employer has a functionally distinct occupation within the business that is seasonal, due to the fact that the assigned duties or activities as a whole are identifiably distinct under the usual and customary practice of the industry. These duties or activities are performed during a period of less than 16 weeks in a calendar year due to the climate or nature of the products or services.

There are defined procedures and deadlines for employers who want to obtain seasonal certification and exempt employees from UI benefits.

Municipalities identified several issues regarding seasonal employees. The first question raised was whether there is any benefit to municipalities by expanding the statutory season from 16 to 20 weeks. After careful deliberation, the Task Force concluded that such an extension in season would not provide sufficient benefit to municipalities and could impact the private sector significantly, which is beyond the mandate of this Task Force.

[50] U.S. Department of Labor 2011 Comparison of State Unemployment Insurance Laws.

The second concern was the uncertainty and firmness by DUA around the application process and deadlines for seasonal certification. Since non-compliance with the proper procedures could result in seasonal wages being included in UI coverage, municipalities indicated an interest in a better, more collaborative approach to seasonal certification.

Further, municipalities requested that DUA do a more thorough job of ensuring that claimants who had worked seasonally, but are not exempt due to the length or nature of their positions, adhere to the actively seeking and available for work requirements, especially if they are out of state in the off season.

Finally, municipalities wanted a clearer demarcation between seasonal work and non seasonal work so that they could hire or retain seasonally certified workers in other departments and positions, which benefit the municipalities as well as the individual.

Legal Framework and Analysis

Under G.L. c. 151A, § 24A(a), a seasonal employee is ineligible to receive UI benefits based on that service, "unless the claim is filed within the operating period of the seasonal employment." If a claim is filed outside the seasonal period, "benefits may be paid on the basis of nonseasonal wages only."

An employer may be certified as a seasonal employer if, "because of climatic conditions or the nature of the product or service, [it] customarily operates all or a functional distinct occupation within its business only during a regularly recurring period or periods of less than sixteen weeks for all seasonal periods during a calendar year[.]"[51] An employer seeking seasonal certification must submit the DUA application at least 60 days prior to the beginning of the season.[52] The employment may be considered to be certified as seasonal only after the determination is made by the Agency. An application must be submitted for each distinct seasonal period. An employer who is denied has the right to appeal the determination within ten days. If a certified employer operates its seasonal business for sixteen weeks or more during a calendar year, it loses its seasonal status.[53] There are also procedural requirements placed on the employer so that employees fully understand that they are seasonal employees.

Proposed Solution

It has become clear that there is a great deal of confusion and concern about the seasonal certification process, its requirements, and implications. DUA has not always

[51] G.L. c. 151A, § 1(z).

[52] *Id.*

[53] G.L. c. 151A, § 24A(e).

communicated fully or clearly enough with municipalities, and some municipalities have been lax in submitting the necessary paperwork to obtain seasonal certification.

To address the expressed concerns, the Task Force requests that the following steps be taken:

- DUA will issue a Guidance Letter clarifying this process for employers and answering some frequently asked questions.

- DUA will more formally address those situations where municipalities (as well as all other employers) transfer employees from seasonal to non seasonal work, or vice versa. The following criteria will apply:

  (1) There must be a break in service between the seasonal and non seasonal work; and
  (2) The additional work cannot continue in, be part of or connected to the seasonal operation; and
  (3) There is no intent to improperly avoid UI liability.

  These criteria will provide more flexibility for municipalities in their ability to retain seasonal employees in other employment. Then the seasonal employment will not be counted as base wages towards UI eligibility.

- Beginning in 2013, DUA will schedule two webinars annually, one for summer seasonal work to be scheduled in February and one for winter seasonal work to be scheduled in September. All employers will be notified and invited to participate.

- DUA will allow for modifications of seasonal certification applications if a municipality is able to extend its season, beyond the time frame originally requested, still within the 16 week limitation. This could occur, for example, if a municipality requested a 12 week season for a municipal swimming pool season but later wanted to keep the pool open for additional weeks because of community circumstances or increased funding.

- Finally, DUA will more closely monitor those employees who have worked "seasonally" for a municipality but in a department or position that did not qualify for seasonal certification. These individuals are not exempt from UI benefits because their work did not fall within the framework of seasonal certification. However, DUA will take extra steps to ensure that these claimants fulfill their obligations to be actively seeking and available for work.

Expected Outcome

The Task Force is confident that the implementation of all of the steps identified above will allow municipalities to better manage their seasonal needs, ensure that truly seasonal employees are not UI eligible and that individuals fulfill all statutory requirements if receiving UI benefits.

STEPS TAKEN BY DUA

One of the noteworthy findings of the Task Force is the degree to which municipal UI costs can be reduced through policy and administrative changes by both DUA and the municipalities themselves. The Task Force recognizes the changes already implemented by DUA and recommends that it continue to evaluate its policies and procedures going forward. The changes either already made or in process by DUA include:

1. The establishment of a dedicated municipal UI unit having oversight of municipal cases with its own direct phone line available to municipalities. In addition, DUA will commit to having specialized Review Examiners to hear municipal cases.

2. DUA has proposed legislation, included in Attachment 14, which would allow it to participate in the U.S. Treasury Offset Program and collect unpaid UI benefits improperly paid to claimants, as it now does with state tax refunds. This is of particular importance to municipalities as all monies collected would go directly into their accounts.

3. The provision of additional training to DUA Adjudicators and Review Examiners on municipal UI benefits. In particular DUA developed a municipal module for its comprehensive UI training program, which it included for the first time in the spring of 2012. This training will continue for staff through the fall of 2012. DUA will continue to provide on-going training to staff on municipal UI issues as warranted.

4. The issuance of a DUA guidance letter on "On-Call Firefighters and EMTs". DUA will continue to issue guidance letters to municipalities, as needed.

5. The revisions of certain policies, particularly regarding on-call employees, substitute teachers, seasonal employees and reasonable assurance, as noted in the appropriate sections above. Additionally, DUA is revising its internal case management manuals to reflect these clarifications and will do outreach to relevant stakeholders to inform them of these revisions.

6. The continuing review of DUA forms, for both claimants and municipal employers. Where greater clarity is possible, the agency will revise them accordingly.

7. Increasing outreach to municipalities to achieve the proper treatment of claims by educators who, although initially laid off at the end of a school year, obtain a reasonable assurance of employment during the summer for the upcoming school year.

8. Increasing recovery efforts for UI benefits improperly paid to claimants so that cities and towns can recoup a greater percentage of charges for benefits that are later rescinded. DUA will be recommending legislation, as noted above that would authorize DUA to participate in a federal program that allows the interception of federal tax refunds to recover benefit overpayments.

9. Responding to all 109 municipalities who sent requests for clarification on UI policies or specific claimants in March 2012. These interactions and dialogues increased a sense of collaboration and partnership between DUA and municipalities.

10. The establishment of two annual webinars hosted by DUA to which all municipalities will be invited so that they can be kept abreast of the requirements for seasonal certification. One will be held in February for summer seasonal certification and the other in September in anticipation of winter seasonal certification. The Task Force encourages all municipalities considering seasonal certification to participate in these webinars.

11. Engaging municipalities, public sector unions, the MMA, and other organizations representing varying aspects of municipal finance, personnel, and UI since March 2012. EOLWD and DUA have led seminars, conducted educational programs, written for publications, and met with municipal stakeholders, whether on particular cases or policy and practices generally. These meetings have been very productive for all parties. The ability to work through issues, recognize responsibility, and implement changes, on all sides, will lead to better communication, management, and outcomes.

The Task Force has also had the opportunity to review and analyze the ways in which municipalities manage their UI claims. The Task Force appreciates the concerns voiced by many municipalities over the law, its application, the unexpected financial hardships caused by the recession, and some delays and difficulties at DUA. It also recognizes that municipalities must remain proactive and responsive to DUA to ensure the most efficient management of their UI costs.[54]

[54] When this awareness has been raised by DUA with municipalities, the response has often been that municipalities claim it is fruitless to appeal, because the claimant always wins. An analysis of municipal UI claims in 2011 does not support this perception. For the calendar year 2011 municipal employers did not respond or responded late on 7,338 out of 21,468 claims filed (34%). Despite this, claimants only prevailed in about half of all claims filed against municipalities. This is significant because it demonstrates that even with no or limited information from municipal employers, claimants were not automatically conferred benefits. However, municipalities are urged to be responsive to DUA, fully participate in hearings and all DUA proceedings to maximize their chances of success.

The Task Force suggests the following recommendations to municipalities:

1. Create a systemic approach for managing UI costs, for example, by designating one municipal official (including for the school department) to be responsible for and manage UI claims. Municipalities have been forthcoming that there are often challenges integrating the school and municipal departments with respect to managing UI claims and costs. The Task Force suggests that better coordination between these departments will help manage the UI cases of the municipality.

2. Respond timely to every request made by DUA, particularly when filing Forms 1062/1074, the Requests for Wage and Separation Information.

3. If using a Third Party Administrator (TPA), make sure that the TPA is accountable to the municipality and that oversight is provided by the town official responsible for UI costs.

4. Review benefit charge statements monthly. If the charges are inaccurate, immediately request a review of the charges.

5. Develop an internal system so that all municipal officials who are involved with UI claims coordinate their efforts and information. One frequent example was the lack of communication between the school department official who calls in substitute teachers and the municipal official who needs to report the work or refusal of work by substitutes to DUA. When that coordination is absent, the work or refusal to work often goes unreported to DUA, and the claimant is awarded benefits even when he/she is actually ineligible.

6. Report to DUA all information available to municipalities that will enable DUA to better respond to their claims. For example, municipalities should notify DUA when educators are offered positions for subsequent school years, when individuals are offered additional work hours, or when the municipality has information that an individual has commenced work elsewhere or declined work. Having this information will assist DUA is properly determining UI eligibility.

7. Participate in educational workshops, webinars and seminars on municipal UI issues by DUA or other entities.

8. Be prepared with the proper information and appropriate and knowledgeable witnesses at all hearings before Review Examiners; remember that all evidence and arguments must be presented at the hearing, regardless of what may have previously been presented at the adjudication stage. If there is sufficient interest among municipalities, DUA will work with the MMA to hold a seminar on how to present a case at DUA.

9. Report to DUA all suspected fraud, reemployment and other factors that impact employee eligibility for UI benefits.

CONCLUSION

The Task Force is confident that implementation of its suggestions, recommendations and legislative changes[55] will result in a significant improvement of the municipal UI system. This report demonstrates that DUA now has a better understanding of the issues and challenges faced by municipalities and that the agency has developed procedures, employee educational modules, policy changes and clarifications, external educational opportunities for municipalities, and a greater willingness and capacity to interface with cities and towns.

The Task Force also believes that one of the positive aspects of the spotlight on municipal UI costs and issues has been that municipalities are more aware of the tools available to them to better manage their approach to UI issues and more fully engage in the process to better control their UI costs.

The Task Force believes that the combination of these approaches and their successful implementation will result in better outcomes for municipalities, better management of municipal UI costs, and a better UI system for claimants and their public employers.

The Task Force urges that a review of its recommendations be undertaken in January of 2014 at which time it is anticipated that its recommendations will have been fully integrated and operational. The Task Force would welcome the opportunity to undertake that review.

Further, the Task Force wants to applaud all parties involved for their hard work, willingness to engage in this complex and comprehensive review, openness in recognizing their roles in the issues, and willingness to be part of the solution.

Finally, the Task Force wants to thank Governor Deval Patrick, Senate President Therese Murray, Speaker Robert DeLeo and Secretary Joanne Goldstein for entrusting this important task to us. We took our role on this Task Force very seriously and understood its significance to the Commonwealth, its cities and towns, and public employees. We have endeavored to discharge our duty fairly and impartially, with consideration and deliberation over all of the issues. To the best of our ability, we have provided conclusions and recommendations that, in our judgment, provide balanced solutions to the issues presented. We appreciate and value the opportunity we had to serve.

[55] The draft bill which includes all of the proposed statutory changes by the Task Force is attached as Attachment 14.